JAMES A. MALESKY (ON RECONSIDERATION)

IBLA 86-35
102 IBLA 175 (1988) Decided January 9, 1989

Appeal from a decision of the Oregon State Office, Bureau of Land Management, rejecting desert land entry application OR 36106 (WA).

Prior Board decision reversed; BLM decision affirmed.

1. Applications and Entries: Generally--Desert Land Entry: Applications--Powersite Lands--Withdrawals and Reservations: Generally--Withdrawals and Reservations: Powersites--Withdrawals and Reservations: Revocation and Restoration

Under the preliminary injunction order issued in National Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), BLM was precluded
from terminating powersite classifications and
restoring lands described in a desert land entry application.

APPEARANCES: James A. Malesky, pro se; Richard D. Woodcock, Esq., Office
of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

On July 11, 1988, the Bureau of Land Management (BLM) filed a petition for correction and clarification (hereinafter petition) of the Board's May 3, 1988, decision in James A. Malesky, 102 IBLA 175. 1/ According to
a certificate of service subsequently filed by BLM, a copy of the petition was served on James A. Malesky on August 22, 1988, but no response to the petition has yet been filed by him. In its petition, BLM states that it does not seek reconsideration of the Board's May 1988 decision. However,

1/ In our May 1988 decision, we referred to appellant as James A. Maleski. However, the record shows that appellant's correct name is James A. Malesky. Hereinafter, when referring to appellant and in citing or referring to the Board's May 1988 decision, we will use appellant's correct name.

we conclude that reconsideration is warranted. Furthermore, based upon our review of BLM's petition and reconsideration of the Board's May 1988 decision, we conclude that the decision was in error in significant part and, accordingly, reverse that decision.

In our original decision in Malesky, we set aside an August 28, 1985, decision of the Oregon State Office, BLM, which had rejected Malesky's desert land entry application on the basis that, although Malesky had requested termination of conflicting powersite classifications, BLM did not anticipate acting on his request "within the near future" in view of pending litigation in the case of National Wildlife Federation v. Burford, No. 85-2238 (D.D.C.). Thus, the land remained unavailable for such entry.

The facts in the case are that Malesky had originally filed his desert land entry application with BLM on April 4, 1983, for 120.2 acres of land situated in sec. 26, T. 28 N., R. 23 E., Willamette Meridian, Washington, pursuant to section 1 of the Act of March 3, 1877, as amended, 43 U.S.C. | 321 (1982). At the time his application was filed, that land was subject to two powersite classifications (Nos. 349 and 400), dated, respectively, June 22, 1944, and February 15, 1949. Under well-established doctrine, the powersite classifications, which constituted a reservation of the affected land, precluded the making of a desert land entry. See 43 CFR 2520.0-8(a); LeRoy Martin, 4 IBLA 160 (1971); Dores D. McGhee, A-27590 (May 22, 1958); Charles L. Griffith, A-25977 (Jan. 10, 1951). Accordingly, in conjunction with filing his application, Malesky requested termination of the powersite classifications.

BLM subsequently decided to grant Malesky's request but before BLM could take any action to terminate the powersite classifications, the National Wildlife Federation (NWF) filed suit in Federal district court on July 15, 1985, challenging the Department's termination of classifications and revocation of withdrawals which had taken place on or after January 1, 1981, as inconsistent with the Department's statutory obligations including applicable provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. || 1701-1784 (1982). 2/ Moreover, in conjunction with that suit, NWF sought a preliminary injunction to prevent the modification, termination or alteration of any classification or withdrawal in effect on January 1, 1981. As we stated in our May 1988 decision, BLM apparently regarded the filing of the suit as "sufficient grounds for not proceeding with the termination of [the] powersite classification[s]." James A. Malesky, supra at 179. BLM, therefore, refused to take any action to terminate the powersite classifications and, in its

---

2/ In footnote 4 on page 179 of our May 1988 decision in Malesky (102 IBLA), we inadvertently deleted language in a quotation taken from page 1 of a Mar. 10, 1986, memorandum from the Solicitor to all Assistant Secretaries and Bureau Directors referring to the allegations made by NWF in its initial complaint and amended complaint filed on Aug. 19, 1985. The deleted language is underscored as follows: "(2) the withdrawal review provisions of FLPMA (| 204(1)), by revoking withdrawals under | 204(a) of FLPMA."

August 1985 decision, rejected Malesky's desert land entry application because the land was not then available for such entry. However, on appeal, we concluded that subsequent events in the NWF litigation, especially the
district court's issuance of a preliminary injunction on February 10, 1986, demonstrated that it "should not be considered a barrier to [termination] of powersite classifications." Id. Accordingly, we set aside the August 1985 BLM decision and remanded the case to BLM "for further processing of appellant's request for termination of the powersite classifications." 3/ Id.
at 180.

Our determination that the NWF litigation did not preclude termination of the powersite classifications was premised on our reading of the February 1986 preliminary injunction, which enjoined the Department in relevant part from "terminating, * * * in full or in part, under the Federal Land Policy and Management Act (FLPMA), any * * * classification that was in effect on January 1, 1981" (National Wildlife Federation v. Burford, 24 Env't Rep. Cas. (BNA) 1082, 1088 (D.D.C. Feb. 10, 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987)), and, most importantly, our subsequent conclusion that termination
of the powersite classifications would not be taken pursuant to FLPMA but, rather, pursuant to section 24 of the Federal Power Act, as amended, 16 U.S.C. | 818 (1982). Indeed, we noted that BLM was statutorily required to terminate the classifications where the Federal Energy Regulatory Commission (FERC) had made the requisite no injury determination under section 24 of the Federal Power Act, citing Reeves v. Andrus, 465 F. Supp. 1065 (D. Alaska 1979), and that the "NWF lawsuit did nothing to preclude BLM from

---

3/ In addition to the powersite classifications, the land involved herein was, at the time of the filing of Malesky's application, subject to Exec. Order No. 6964, dated Feb. 5, 1935 (55 I.D. 188). In our original deci-
sion, we erroneously referred to Exec. Order No. 6910 (Nov. 26, 1934).
That order, however, did not affect any land in the State of Washington. In the present context, the effect of Exec. Order No. 6964 was to withdraw the affected land from desert land entry pending classification of the land as suitable for such entry. Accordingly, in conjunction with filing his application, Malesky petitioned for classification of the subject land as suitable for such entry. Apparently, BLM subsequently began the process of classifying the land as suitable for desert land entry. However, at the time of BLM's August 1985 decision, no final action had been taken. Nevertheless, there is no indication that BLM regarded the pending litigation as precluding action to classify the subject land as suitable for desert land entry. In any case, in Malesky, we expressly concluded that BLM was not precluded from taking such action and instructed BLM on remand to consider classifying the land as suitable for desert land entry. We reaffirm our original conclusion that the district court's February 1986 preliminary injunction did not preclude BLM's classification of the subject land as suitable for desert land entry to the extent that the land was also sub-
ject to the withdrawal effected by Exec. Order No. 6964. That withdrawal expressly provided for classification of the land. Such classification is, thus, not "inconsistent with the specific restrictions" of the withdrawal. National Wildlife Federation v. Burford, supra at 1088. Nor do we regard such classification as "modifying" the withdrawal. Id.

performing this duty." James A. Malesky, supra at 180. We, therefore, instructed BLM to proceed with processing Malesky's request to terminate the powersite classifications.

Section 24 of the Federal Power Act specifically provides that whenever, in the case of lands "classified as power sites," 4/ FERC determines that the lands will not be injured or destroyed for purposes of power development by entry under the public land laws, the Secretary of the Interior "shall declare such lands open to * * * entry." 16 U.S.C. | 818 (1982). In our May 1988 decision, we concluded that FERC had made this no injury determination based on the fact that BLM had, in a May 23, 1983, letter, requested FERC to act on Malesky's request for termination of the powersite classifications "pursuant to section 24 of the Federal Power Act," and FERC had responded by letter dated January 28, 1985, stating that it had "no objection" to the termination of the powersite classifications to the extent they affected the subject land. James A. Malesky, supra at 176. Therefore, we held, in accordance with Reeves, that upon issuance of the no injury determination BLM was required by section 24 of the Federal Power Act to terminate the powersite classifications. Our present review, however, raises serious questions regarding the validity of that holding.

We are led to this inquiry by BLM's petition which provides evidence regarding the actual sequence of events which resulted in FERC's January 1985 letter to BLM and the underlying arrangement between FERC and BLM and concludes that "[u]ltimately * * * BLM did not seek a section 24 'no injury determination' as a prerequisite to [terminating] the power site classification[s] * * * and * * * FERC never provided such a determination" (Petition at 6-7). Specifically, BLM submits evidence that BLM is required by a July 20, 1966, Memorandum of Understanding (MOU) between the Federal Power Commission (FPC), now FERC, and the Department of the Interior to refer requests for termination of powersite classifications to the FPC for a "determination pursuant to Section 24 [of the Federal Power Act]" (Exh. 6 attached to Petition, at 9). BLM states that the July 1966 MOU is "still in effect" (Petition at 7). However, BLM provides evidence that FERC's January 1985 letter indicating its non-opposition to termination was not in response to BLM's May 23, 1983, letter, but, rather, was expressly in response to a May 11, 1984, BLM letter which requested FERC's "concurrence" in BLM's recommendation that the two powersite classifications be terminated to the extent they affected the subject land, based on BLM's conclusion that they had served their useful purpose (Exh. 5 attached to Petition, at 2).

4/ In its petition, at page 3, BLM states that the Board, in discussing the language of section 24 of the Federal Power Act at page 178 of our May 1988 decision (102 IBLA), may have generated confusion between powersite classifications and "power project reservations." We had intended to create no such confusion. We are aware that the case involves land reserved as a result of two powersite classifications and not as a result of the filing of an application for a proposed power project. See Armin Speckert, A-30854 (Jan. 10, 1968).

Ultimately, however, BLM concludes that it will not object to the Board's conclusion that FERC issued a no injury determination, but requests the Board to clarify its May 1988 decision by essentially stating that, had a no injury determination not been made, the Board would have been required to determine whether such a determination was a prerequisite for BLM's termination of the powersite classifications. BLM has provided evidence that the question of whether a no injury determination is a prerequisite for BLM's termination of a powersite classification is at present an unresolved question between BLM and FERC. We conclude that, in the context of this case, it is unnecessary to either address this question or state that we would have been obliged to decide it if we concluded that a no injury determination had not been made in this case. 5/

The reason that we need not decide the question of whether a no injury determination by FERC pursuant to section 24 of the Federal Power Act is a prerequisite for BLM's termination of a powersite classification or expressly defer ruling on that question, is that in any event any termination must be effected pursuant to section 204 of FLPMA, 43 U.S.C. | 1714 (1982), thereby bringing any termination of the subject powersite classifications within the ambit of the district court's February 1986 preliminary injunction in National Wildlife Federation v. Burford. This conclusion is directly contrary to our holding in Malesky and to that extent the Board's May 1988 decision must be overruled.

Support for this holding is found in a June 20, 1977, memorandum from the Solicitor to the Director, Geological Survey, which generally concluded, after reviewing the newly enacted FLPMA, that "classifying public lands as power sites" constitutes a "withdrawal" under FLPMA and, thus, "[is subject] to all of the requirements imposed on withdrawals in Section 204 of FLPMA [43 U.S.C. | 1714 (1982)]" (Exh. 2 attached to Petition, at 1). The Secretary implicitly adopted this conclusion in a subsequent July 18, 1977, memorandum to the Directors of BLM and Geological Survey. See Exh. 1 attached to Petition. This conclusion is justified by the fact that a powersite classification, to the extent that it withholds Federal land from entry under the public land laws, constitutes a "withdrawal" within the meaning of section 204 of FLPMA. See 43 U.S.C. | 1702(j) (1982). Moreover, 43 CFR 2091.5-4(a) provides that lands subject to powersite classifications are "considered withdrawn." See also Instructions, 47 L.D. 595, 597 (1920) ("withdrawn lands"). Further, section 204 of FLPMA states that any revocation of a withdrawal shall be made "only in accordance with the provisions and limitations of this section." 43 U.S.C. | 1714(a) (1982). Thus, BLM

5/ Moreover, it appears unclear whether FERC's January 1985 statement of nonobjection to termination of the subject powersite classifications constituted a determination of no injury within the meaning of section 24 of the Federal Power Act. Although such a determination may have been behind that statement, especially in view of the fact that FERC has taken the position that any termination of a powersite classification must always be preceded by such a determination, no express declaration of no injury was made. See Exh. 7 attached to Petition, at 2.

states that "[s]ince shortly after the passage of FLPMA, cancellations of power site classifications have been processed as withdrawal revocation actions under section 204 of FLPMA" (Petition at 5).

Thus, we conclude that, in the present case, any termination of the subject powersite classifications by BLM must be effected pursuant to section 204 of FLPMA, regardless of whether a no injury determination is a prerequisite. Accordingly, we hold that BLM properly deferred action on Malesky's request for termination where NWF had filed suit, seeking in part to enjoin the termination of any classification in effect on January 1, 1981, and that litigation was then pending. In addition, we conclude that BLM, in its August 1985 decision, properly rejected Malesky's desert land entry application in accordance with 43 CFR 2091.1, which requires rejection rather than holding an application pending possible future availability when approval of the application is prevented by withdrawal or classification of the land, as was the case herein. See S & S Land & Cattle Co., 10 IBLA 40, 41 (1973); Edwin L. Doheny, A-26868 (July 13, 1954). Moreover, at the time of our May 1988 decision, any action to terminate the subject powersite classifications was foreclosed pending resolution of that litigation by the district court's February 1986 preliminary injunction in National Wildlife Federation v. Burford, issued subsequent to BLM's August 1985 decision and Malesky's appeal to the Board. Such action was precluded by the specific language of the injunction enjoining the Department from terminating "under * * * FLPMA" any classification in effect on January 1, 1981. National Wildlife Federation v. Burford, supra at 1088. 6/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's decision in James A. Malesky, is reversed and the August 1985 BLM decision appealed from is affirmed.

_____
John H. Kelly
Administrative Judge

We concur:

_____ _____
Franklin D. Arness
Administrative Judge

Gail M. Frazier
Administrative Judge

6/ We note that the district court dissolved its February 1988 preliminary injunction and dismissed the case by order dated Nov. 4, 1988.